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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/533,101	03/20/2006	Nigel Hugh Sanders	1307-5 PCT/US	2312
23869 7590 05/18/2010 HOFFMANN & BARON, LLP 6900 JERICHO TURNPIKE SYOSSET, NY 11791				
EXAMINER				
KRAUSE, ANDREW E				
ART UNIT		PAPER NUMBER		
1781				
MAIL DATE		DELIVERY MODE		
05/18/2010		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No. 10/533,101	Applicant(s) SANDERS ET AL.
Examiner ANDREW KRAUSE	Art Unit 1781

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 23 April 2010 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.
NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).

5. ☐ Applicant's reply has overcome the following rejection(s): _____.

6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).

7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: _____.

Claim(s) objected to: _____.

Claim(s) rejected: 1-8 and 11-13.

Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☒ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).

9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).

10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.

12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____

13. ☐ Other: _____.

/Lien Tran/
Primary Examiner
Art unit 1781

/ANDREW KRAUSE/
Examiner, Art Unit 1781

Continuation of 11, does NOT place the application in condition for allowance because: 1. Applicant argues that, "Aldrich is directed to a method for preparing co-deposited, two-component hard candy having a hard candy shell portion and core portion that may be soft. Aldrich states that the core may be milk-based and mentions chocolate. However, nowhere in Aldrich are examples employing chocolate disclosed or suggested, in contrast, one example describes a shell composition that is maintained at about 290 F (143 C) and a core composition that is held at about 100 F (37°C). If one of skill in the art were to employ chocolate in place of the soft candy core, the process would not be effective. The chocolate would be heated toward 290 F, become too viscous and thus block the equipment."

2. It is first noted that the use of patents as references is not limited to what the patentees describe as their own inventions or to the problems with which they are concerned. They are part of the literature of the art, relevant for all they contain." In re Heck, 699 F.2d 1331, 1332-33, 216 USPQ 1038, 1039 (Fed. Cir. 1983) (quoting In re Lemelson, 397 F.2d 1006, 1009, 158 USPQ 275, 277 (CCPA 1968)). A reference may be relied upon for all that it would have reasonably suggested to one having ordinary skill in the art, including nonpreferred embodiments. Merck & Co. v. Biocraft Laboratories, 874 F.2d 804, 10 USPQ2d 1843 (Fed. Cir.), cert. denied, 493 U.S. 975 (1989). Clearly Aldrich suggests the use of chocolate as the core component.

3. With respect to applicants argument that the chocolate would become too viscous and thus block the equipment, no evidence is provide to support this assertion. As Aldrich discloses the use of chocolate as a potential core component, and carries out the claimed method steps of:

a. Preparing a liquid candy composition which solidifies upon cooling, said liquid composition being a first temperature (column 4, lines 51-65);

b. Preparing a second liquid composition which solidifies upon cooling (column 3, lines 25-40), said second liquid composition being at a second temperature which is lower than the first temperature (column 4, lines 62-66); and

c. Co-depositing the liquid candy composition and the second liquid composition in molds (column 3, line 63 to column 4, line 5).

4. Nothing in the Aldrich reference, or evidence provided by applicant suggests that the process disclosed by Aldrich would be inoperable when carried out with chocolate. Before turning to the disclosure of Bollinger, it is additionally noted that "Where...the claimed and prior art products are identical or substantially identical, or are produced by identical or substantially identical processes, the PTO can require an applicant to prove that the prior art products do not necessarily or inherently possess the characteristics of his claimed product. Whether the rejection is based on "inherency" under 35 USC 102, on "prima facie obviousness" under 35 USC 103, jointly or alternatively, the burden of proof is the same, and its fairness is evidenced by the PTO's inability to manufacture products or to obtain and compare prior art products. See In re Brown, 59 CCPA 1036, 459 F.2d 531, 173 USPQ 685 (1972)." In re Best, Bolton and Shaw 195 USPQ 430 (CCPA 1977). Thus, it appears that the level of shear generated on the chocolate in the Aldrich depositor nozzle would be within the claimed range.

5. In response to applicant's argument that Bollinger does not apply high shear is not being applied to increase the critical temperature of the chocolate, i, a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, and then it meets the claim. With respect to the temperatures used, independent claim 1 does not specify that the mixture is at the critical temperature. Further, the primary reference, Aldrich discloses the use of a core temperature of 38 C (about 40 C). The Bollinger reference is cited to disclose the amount of shear produced by the nozzle, which results in chocolate with desirable characteristics. .